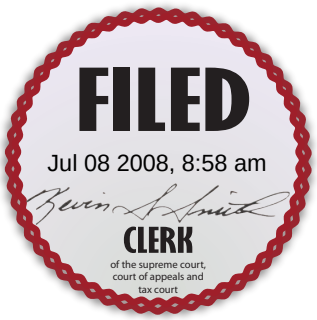

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IN THE
COURT OF APPEALS OF INDIANA

MUNICIPAL TAX LIENS, INC.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 18A02-0804-CV-341
	)	
MICHAEL ALEXANDER,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0005-CP-244

July 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Municipal Tax Liens, Inc. ("MTL") appeals the trial court's grant of summary judgment to Michael Alexander regarding MTL's attorney malpractice complaint against Alexander. MTL raises one issue, which we revise and restate as whether the trial court erred by granting summary judgment to Alexander.[1] We reverse and remand.

The relevant facts follow. Municipal Tax Liens, Inc. ("MTL") owned Realty Asset Properties, Ltd. ("RAP"), which paid attorney fees to Alexander. MTL and Capital Asset Research Partnership ("CARP") had an agreement "wherein the parties purchased and serviced certain tax liens within the State of Indiana." Appellant's Appendix at 38. MTL and CARP purchased and serviced certain tax certificates in Vigo County, Indiana, under the name of FUNDCO, Inc. MTL and CARP became "involved in litigation between each other wherein it was alleged that certain monies were owed to each party by the other." Id. at 39. MTL and CARP entered into a confidential settlement agreement, and CARP paid MTL a settlement amount that was offset and reduced by the amount of losses attributed to certain tax certificates and liens. At some point, RAP ceased to exist, and MTL assumed all profits and losses of RAP.

MTL filed a complaint against Alexander alleging breach of contract and negligence. Specifically, MTL alleged that it employed Alexander "to represent [MTL]'s interest regarding [MTL]'s tax sale certificates and quiet title actions on [MTL]'s real

[1] MTL did not include the trial court's judgment with its brief, and we direct its attention to Ind. App. Rule 46(A)(10) which requires an appellant's brief to "include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal."

properties within the State of Indiana." Id. at 14. MTL alleged that Alexander breached a contract because MTL had hired and paid Alexander to perform legal services and Alexander failed to perform those services. MTL also alleged that Alexander was negligent because Alexander failed to exercise due diligence and skill in his representation of MTL.

Alexander filed a motion to dismiss under Ind. Trial Rules 12(B)(6), 17, and 19(b), and in support of his motion, filed tax sales certificates for Vigo County. Alexander argued that he never represented MTL and that MTL could not be the party actually injured by his actions. Alexander argued that he represented "FUNB as Custodian for FUNDCO, INC., Realty Asset Properties Ltd., PTS, LLC or Capital Assets Research Corporation and none of these entities have been named as plaintiff in this cause of action." Id. at 18. Alexander also argued that these parties should be joined or the cause should be dismissed. Alexander argued that "[t]he work that [he] is alleged to have failed to complete was for and on behalf of [RAP] and not [MTL]." Id. at 21-22. Alexander conceded that "[t]here can be no doubt that . . . [RAP is an] indispensable part[y] in this action." Id. at 23.

MTL filed a response to Alexander's motion to dismiss. MTL stated in its response that Alexander "did not specifically represent [MTL], but [MTL] is the successor in interest of all damages that were allegedly caused by [Alexander]." Id. at 36. MTL also attached an affidavit of James Douglas, the president and sole shareholder

of MTL, and stated that the affidavit "sets forth the facts and reasons that [MTL] is the real party in interest." Id. Douglas's affidavit stated:

> 4. That in 1996, [MTL] had an agreement with Capital Asset Research Partnership (CARP) wherein the parties purchased and serviced certain tax liens within the State of Indiana;
>
> 5. That the tax liens/certificates that are the subject of this cause of action were included within the agreement between CARP and MTL;
>
> 6. That CARP and MTL purchased and serviced certain tax certificates in Vigo County, Indiana, under the name of FUNDCO, Inc.;
>
> 7. That subsequent to 1996, CARP and MTL were involved in litigation between each other wherein it was alleged that certain monies were owed to each party by the other;
>
> 8. That CARP and MTL entered into a confidential settlement agreement wherein CARP paid MTL a settlement amount that was offset and reduced by the amount of the losses attributed to the tax certificates and liens within the State of Indiana, including the Vigo County tax sale certificates;
>
> 9. That the damages claimed in this cause of action against [Alexander] are in fact the damages that MTL incurred in its litigation with CARP;
>
> 10. That MTL was the owner of an entity named Realty Asset Properties, Ltd. (RAP);
>
> 11. That RAP paid attorney fees directly to [Alexander] and to Wayne Lennington;
>
> 12. That Wayne Lennington subsequently transferred certain attorney fees to [Alexander] on behalf of RAP;
>
> 13. That RAP is no longer in existence and MTL assumed all profits and losses of RAP;

> 14. That MTL is the real party in interest as it is the party who has sustained out of pocket losses as a result of [Alexander]'s negligence.

Appellant's Appendix at 38-39.

The trial court granted Alexander's motion to dismiss. Specifically, the trial court's order stated, in part:

> 7. In response to the Motion to Dismiss, [MTL] references the Affidavit of James Douglas, which indicates [MTL] had no contract or attorney-client relationship with Alexander. [MTL] brought this action as assignee from another entity, Capital Asset Research Partnership, which assignment [MTL] received through a confidential settlement between [MTL] and Capital. The best argument [MTL] can make is that [MTL] is entitled to any damages awarded in this action. This is not the same as being the "real party in interest," the entity whom Alexander contracted to represent.
>
> 8. The Indiana Supreme Court has recently affirmed its prior holdings and held that no legal malpractice claims may be assigned. *State Farm Mutual Automobile Insurance Co. v. Estep*, 873 N.E.2d 1021, 1025-26 (Ind. [ ] 2007). The Indiana Court of Appeals applied prior Indiana Supreme Court precedent in *Rosby Corp. v. Townsend, Yosha, Cline & Price*, 800 N.E.2d 661, 665 (Ind. Ct. App. 2003), *transfer denied*, with the same result.
>
> 9. Alexander's Motion to Dismiss is well taken and should be granted for at least two reasons: first, the purported assignment of the legal malpractice claim violates Indiana law and is against public policy and is therefore void and of no effect; and second, [MTL] is not the real party in interest in this action.

Appellant's Appendix at 13.

Initially, we note that Alexander's motion to dismiss included tax sales certificates for Vigo County and MTL's response to the motion to dismiss included Douglas's affidavit. Where the trial court, in ruling on a motion to dismiss, considers matters

outside the pleadings, as it did here by relying on Douglas's affidavit, the motion should be treated by the trial court and will be reviewed by this court as a motion for summary judgment. See Ind. Trial Rule 12(B) ("If, on a motion, asserting the defense number (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56."); New Albany-Floyd County Educ. Ass'n v. Ammerman, 724 N.E.2d 251, 255 n.7 (Ind. Ct. App. 2000) ("Although the trial court specifically granted Holman's motion to dismiss and did not rule on his motion for summary judgment, we must nevertheless treat the former as a motion for summary judgment on review."); Galbraith v. Planning Dep't of City of Anderson, 627 N.E.2d 850, 852 (Ind. Ct. App. 1994) (treating the trial court's dismissal of plaintiff's complaint as a summary judgment for the defendant when plaintiff submitted an affidavit and trial court acknowledged that it considered matters outside the pleadings).

The sole issue is whether the trial court erred by granting summary judgment to Alexander. Our standard of review for a trial court's grant of a motion for summary judgment is well settled. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(c); Mangold ex rel. Mangold v. Ind. Dep't of Natural Res., 756 N.E.2d 970, 973 (Ind. 2001). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Mangold, 756 N.E.2d at 973. Our review of a

summary judgment motion is limited to those materials designated to the trial court. Id. We must carefully review a decision on summary judgment to ensure that a party was not improperly denied its day in court. Id. at 974. Any doubt as to the existence of an issue of material fact, or an inference to be drawn from the facts, must be resolved in favor of the nonmoving party. Cowe v. Forum Group, Inc., 575 N.E.2d 630, 633 (Ind. 1991).

Where a trial court enters findings of fact and conclusions thereon in granting a motion for summary judgment, as the trial court did in this case, the entry of specific findings and conclusions does not alter the nature of our review. Rice v. Strunk, 670 N.E.2d 1280, 1283 (Ind. 1996). In the summary judgment context, we are not bound by the trial court's specific findings of fact and conclusions thereon. Id. They merely aid our review by providing us with a statement of reasons for the trial court's actions. Id.

We note that MTL's complaint alleging a breach of contract and negligence essentially states a claim for legal malpractice. See Alvarado v. Nagy, 819 N.E.2d 520, 525 (Ind. Ct. App. 2004) (holding that plaintiff's complaint stated a claim for legal malpractice). In order to establish a case of legal malpractice, a plaintiff must demonstrate that he: 1) employed the attorney, 2) who failed to exercise ordinary skill and knowledge, 3) proximately causing, 4) damage to the plaintiff. Rice, 670 N.E.2d at 1283-1284. As long as Alexander negates at least one element of MTL's malpractice claim, the trial court's grant of summary judgment will be upheld. Legacy Healthcare, Inc. v. Barnes & Thornburg, 837 N.E.2d 619, 624 (Ind. Ct. App. 2005), reh'g denied, trans. denied.

MTL argues that the trial court erred by granting summary judgment to Alexander. Specifically, MTL argues that the trial court erred by finding that: (A) CARP assigned its malpractice claim against Alexander to MTL; and (B) MTL was not a real party in interest. We will address each argument separately.

A. Assignment of Malpractice Claim from CARP to MTL

The Indiana Supreme Court has held that legal malpractice claims are not assignable. Picadilly, Inc. v. Raikos, 582 N.E.2d 338, 339 (Ind. 1991). Here, the trial court found that "[MTL] brought this action as assignee from another entity, Capital Asset Research Partnership, which assignment [MTL] received through a confidential settlement between [MTL] and Capital." Appellant's Appendix at 13. MTL argues that the trial court's finding was "an incorrect reading of MTL's response to Alexander's Motion to Dismiss and the Affidavit of James Douglas." Appellant's Brief at 7. Douglas's affidavit stated, in part:

> 8. That CARP and MTL entered into a confidential settlement agreement wherein CARP paid MTL a settlement amount that was offset and reduced by the amount of the losses attributed to the tax certificates and liens within the State of Indiana, including the Vigo County tax sale certificates;
>
> 9. That the damages claimed in this cause of action against [Alexander] are in fact the damages that MTL incurred in its litigation with CARP;

Appellant's Appendix at 39. Douglas's affidavit does not expressly state that CARP had a malpractice claim against Alexander and assigned it to MTL. Rather the affidavit merely states that the settlement reached by MTL and CARP was offset and reduced by

the amount of losses attributed to the tax certificates and liens. Construing the facts and reasonable inferences drawn from the facts in MTL's favor, we cannot say that CARP assigned a legal malpractice claim based on Douglas's affidavit.

B. Real Party in Interest

MTL argues that, contrary to the trial court's finding, it is a real party in interest. Indiana Trial Rule 17(A) states that "[e]very action shall be prosecuted in the name of the real party in interest." Standing is similar to, although not identical with, real party in interest requirements of Indiana Trial Rule 17. Hammes v. Brumley, 659 N.E.2d 1021, 1029 (Ind. 1995), reh'g denied. Standing refers to the question of whether a party has an actual demonstrable injury for purposes of a lawsuit. Id. A real party in interest, on the other hand, is the person who is the true owner of the right sought to be enforced. Id. at 1030. He or she is the person who is entitled to the fruits of the action. Id.

MTL argues that it is entitled to pursue damages that RAP sustained as a result of Alexander's representation of RAP because MTL was "the owner and successor in interest" of RAP. As previously mentioned, the Indiana Supreme Court has held that legal malpractice claims are not assignable. Picadilly, 582 N.E.2d at 339. However, in Summit Account & Computer Serv., Inc. v. RJH of Florida, Inc., 690 N.E.2d 723 (Ind. Ct. App. 1998), reh'g denied, trans. denied, this court found that Picadilly did not bar a legal malpractice claim that was assigned to a successor corporation where that corporation was a direct continuation of its predecessor.

Here, Alexander conceded in his memorandum in support of his motion to dismiss that RAP was one of the real parties in interest. Douglas's affidavit stated, in part:

> 10. That MTL was the owner of an entity named Realty Asset Properties, Ltd. (RAP);
>
> 13. That RAP paid attorney fees directly to [Alexander] and to Wayne Lennington;
>
> 14. That Wayne Lennington subsequently transferred certain attorney fees to [Alexander] on behalf of RAP;
>
> 13. That RAP is no longer in existence and MTL assumed all profits and losses of RAP;
>
> 14. That MTL is the real party in interest as it is the party who has sustained out of pocket losses as a result of [Alexander]'s negligence.

Appellant's Appendix at 38-39. Based on Douglas's affidavit and construing the facts and reasonable inferences drawn from the facts in MTL's favor, we conclude that a genuine issue of material fact exists regarding whether MTL is a direct continuation of RAP and whether RAP assigned the legal malpractice claim to MTL. Thus, the trial court erred by granting summary judgment to Alexander. See Patterson v. Seavoy, 822 N.E.2d 206, 209, 211 (Ind. Ct. App. 2005) (addressing the trial court's grant of the defendant's motion for summary judgment, which argued in part that the plaintiff was not a real party in interest, and holding that plaintiff was a real party in interest).

For the foregoing reasons, we reverse the trial court's grant of summary judgment to Alexander and remand for proceedings consistent with this opinion.

Reversed and remanded.

NAJAM, J. and DARDEN, J. concur